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The Commander and the Arbitrator: Review of Arbitration Awards by the Federal Labor Relations Authority

Captain Terry E. Thomason
U.S. Army Element,
Office of the Joint Chiefs of Staff

Introduction

"Sir, the commander is on line one."

"Yes sir."

"Hey Judge, the union just stomped out of here ranting and raving about the Provost Marshal's new parking plan. They say that they won't obey it and that no arbitrator would enforce it. The Civilian Personnel Officer says your Labor Counselor thinks they're right. What's going on here? No arbitrator has the authority to tell me how to run my post."

Commanders do not like to be told what to do. As commanders, they are held responsible for the readiness and efficiency of the military organization and no other person can assume that responsibility. Consequently, actions by another person which reverse the commander's decisions are generally resented even though commanders generally recognize the authority of federal courts and administrative agencies to review and reverse military decisions. This resentment increases when an individual not recognized as having any authority interferes with the commander's management decisions such as when an arbitrator re-

verses a commander's decision. To prevent adverse results at arbitration, the judge advocate must be able to advise the commander of the possible consequences of management decisions that are disputed by the union and submitted to arbitration and be able to effectively represent that commander's position at arbitration. The purpose of this article is to provide an overview of an arbitrator's authority in order to assist the judge advocate in providing effective advice and representation.

History in the Federal Sector

A grievance procedure is a step-by-step method for the submission of complaints provided in a collective bargaining agreement (CBA). Normally, the complaint or "grievance" is submitted to the first-line supervisor of the employee complainant. If unresolved, the grievance is then forwarded up the supervisory chain until it is resolved. If the grievance is not resolved by the highest level management authority, the union may submit the matter to arbitration. At this point, the matter is first presented to an individual, the arbitrator, who is not under the control of the commander. Management and the union present their positions to the arbitrator who decides the issues as a judge would in a court proceeding. The decision of the arbitrator is binding on the parties.

This procedure first appeared in federal sector labor relations when President Nixon signed Executive Order 11491 (the Order).[1] The Order provided the framework for labor-management relations in the federal government.

Because of limitations in the Order, grievance arbitration did not impact significantly on federal sector labor relations.

Union and management negotiators were *permitted*, but not *required*, to include a provision for arbitration of grievances in a CBA. In addition, matters for which there was a statutory appeals procedure could not be submitted through grievance procedures.[2] Since there were numerous such appeals procedures, many matters could not by law be submitted to binding arbitration.[3]

These limitations were removed with the passage of the Civil Service Reform Act of 1978 (the Act).[4] With only narrow exceptions, grievance procedures now cover the full spectrum of potential employee complaints.[5] In addition, the Act *requires* that the grievance procedures culminate in

[1]Exec. Order No. 11491, § 13(b), 5 C.F.R. Pt. 754 (1982).

[2]*Id.* at § 13(a).

[3]Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Fed. Lab. Rel. Rep. Highlights No. 9, at IV-23 (June 1981).

[4]Pub. L. No. 95-454, 92 Stat. 1111 (1978).

[5]5 U.S.C. § 7121 (Supp. III 1979). *See also* 5 U.S.C. § 7103(a)(9) (Supp. III 1979) (broad definition of "grievance").

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binding arbitration.[6] Because of the broader scope of grievance procedures and the requirement for binding arbitration, grievance and arbitration is now a very attractive procedure for unions to challenge management decisions. The commander can now anticipate unions resorting to grievance and arbitration more often and on a broader scope of issues. Consequently, management action in attempting to resolve complaints during the grievance procedure becomes more important than ever before. The possibility that the complaint will be decided by someone outside the command adds the risk that the final resolution may be detrimental to the command. The risk is compounded by the narrow grounds and rigid time constraints for appealing awards.[7]

Some alternatives the commander should consider when reviewing a grievance are: "Based upon these facts what might an arbitrator decide?"; "If this goes to arbitration, what can the arbitrator do?"; and "If the arbitrator is wrong, what can I do about it?" One method of answering these questions is to review the decisions of the Federal Labor Relations Authority (FLRA). The FLRA decisions provide some insight into what an arbitrator can do, how far his award can go, and what the commander and his management representatives can do to effectively present the management case at arbitration and on appeal. In those areas in which the FLRA has not ruled, this article will review older cases decided under the Order and attempt to predict how the FLRA will address the issues raised.

Grounds for Review

Under the Order, the Federal Labor Relations Council (FLRC) adopted nine grounds for review of arbitration awards:

(1) The award violates applicable law;

(2) The award violates an "appropriate regulation";

(3) The award violates E.O. 11491;

(4) Grounds similar to those applied in private sector labor-management relations;[9]

(a) The arbitrator exceeded his authority;

(b) The award does not draw its essence from the Collective Bargaining Agreement;

(c) The award is ambiguous, or contradictory, so as to make implementation of the award impossible;

(d) The award is based upon a "non fact";

(e) The arbitrator was biased or partial;

(f) The arbitrator refused to hear pertinent and material evidence.[8]

Under the Act, the FLRA is charged with similar review authority. Exceptions to arbitral awards may be sustained if the award is contrary to any law, rule, or regulation or on other grounds similar to those applied by federal courts in private sector labor-management relations.[10]

Congress intended to give finality to arbitrator's awards by providing the FLRA with very narrow review authority.[11] The FLRA has acknowledged its limited review authority[12] and has set aside or modified very few awards. An analysis of each of the grounds for review will provide a better appreciation of the narrowness of review.

Contrary to Any Law, Rule or Regulation

In the federal sector, the arbitrator must not only consider the CBA but must also take into ac-

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[6]5 U.S.C. § 7121(b)(3)(C) (Supp. III 1979).

[7]The Act provides little time for post-award research on grounds for review. The FLRA has consistently interpreted 5 U.S.C. § 7122(b) (Supp. III 1979) to place a non-waivable thirty day statute of limitations for filing exceptions to awards. *See* Department of the Air Force, Kessler Tech. Training Center, 5 FLRA No. 56 (1981); Social Sec'y Admin., Mid-America Prog. Serv. Center, 2 FLRA No. 53 (1979).

[8]Frazier, *Labor Arbitration in the Federal Service*, 45 Geo. Wash. L. Rev. 712, 717-50 (1977).

[9]*Id.* at 738.

[10]5 U.S.C. § 7122(a) (1976).

[11]H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 153, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860, 2887.

[12]Federal Aviation Sci. & Tech. Ass'n, 2 FLRA No. 85, at 1 n.1 (1980).

count statutes, rules, and regulations. An award cannot be contrary to a law, rule, or regulation.

Contrary to Law

Awards must conform to applicable law. The statute which always impacts upon arbitration awards is the Civil Service Reform Act.[13] In *172nd Infantry Brigade*,[14] the FLRA reviewed an arbitral award involving management's right to assign work under the Act. The union grievance concerned a unilateral act by the command to change the position descriptions of its first-line supervisors. Originally, the first-line supervisors had had the authority to make selections for certain vacancies. The command withdrew this selection authority from the supervisors and gave it to the general foremen. The union grievance charged that the change violated the CBA and an activity regulation incorporated into the CBA. The applicable regulation stated that "[t]he selecting supervisor (normally the immediate supervisor of the job being filled) will interview ALL employee applicants referred . . ."[15]

The arbitrator did not accept the union's claim that the change to position descriptions impermissibly violated the CBA provisions. Instead, the arbitrator found that the right to change the position descriptions was a statutorily protected management right.[16] The FLRA agreed and stated:

> . . . *an arbitrator may not interpret or enforce a provision of a collective bargaining agreement so as to deny an agency the authority to exercise its rights under section 7106* and that those rights may not be infringed upon, waived, or relinquished through the award of an arbitrator . . .
>
> . . . [W]hile the rights of Management set forth in section 7106(a) are subject to *section 7106(b)(2),* this provision *only authorized the establishment of procedures to the extent that they do not prevent Management from acting at all* . . . The changes made by the Activity were clearly within its right under section 7106(a)(2)(B) of the [Act] to assign work.[17]

Based upon the discussion in *172nd Infantry Brigade*, an arbitral award which *prevents* management from exercising its statutory rights is contrary to law. However, this limitation is not as broad as it seems. In *San Antonio Air Logistics Center*,[18] the FLRA upheld an administrative law judge's recommended order directing management to rescind a cancellation of work positions. The order was intended to remedy management's wrongful failure to negotiate the impact and implementation of a program to re-evaluate positions and to restructure the work force. The FLRA found the activity evaluated its employees at least once a year and the order to rescind the previous action was only a *"status quo ante"* remedy which would not create a "serious disruption" in the activity's operations.[19] Therefore, an award directing management to rescind an action which is within protected management rights may be upheld if the remedy was reasonably framed to protect the union's right to negotiate the impact and implementation of protected management rights. In order to successfully challenge such an award, management must establish that the action is a protected management right *and* that the award would so disrupt the activity's operations as to prevent management from exercising its rights at all.

The FLRA has found awards which limit access to the grievance arbitration procedure to be contrary to the Act. In *Department of Labor*,[20] the arbitrator ruled that the separation of a probationary employee was not grievable under the Act and therefore not arbitrable. The ruling was based upon the arbitrator's conclusion that the probationary period was an "examination" which is one

[13]Pub. L. 95-454, tit. VII, §§ 701, 703(a)(2), 92 Stat. 1191, 1217 (codified at 5 U.S.C. §§ 7101-35 (Supp. III 1979)).

[14]6 FLRA No. 85 (1981).

[15]5 C.F.R. Pt. 2425 (1982).

[16]6 FLRA No. 85, at 3 (citing 5 U.S.C. § 7106(a) (Supp. III 1979)).

[17]*Id.* (citations omitted) (emphasis added). *See also* Professional Airtraffic Controllers Org., 5 FLRA No. 101 (1981).

[18]San Antonio Air Logistics Center, 5 FLRA No. 22 (1981).

[19]*Id.* at 2.

[20]4 FLRA No. 51 (1980).

of the few matters excluded from grievance procedures by the Act.[21] After review of the legislative history and the terms of Title 5, United States Code, the FLRA determined that an employee's probationary period is not an "examination" within the meaning of the Act and not statutorily excluded. Accordingly, the award was contrary to the Act and the exception was substained.[22]

A similar question arose in *Marine Corps Logistics Support Base*.[23] The union filed a grievance concerning management work assignments. At arbitration, the parties could not agree on framing the issues. The union's proposed issues questioned whether management's actions violated specific provisions of the CBA. Management's proposed issue was in two parts. As a threshold issue, management asked the arbitrator to determine whether work assignments can be a permissible subject for arbitration. If work assignments were arbitrable, the issue then became whether management's work assignments violated the CBA.

The arbitrator ruled that the matter was not subject to arbitration because the assignment of personnel is a protected management right under the Act. The FLRA disagreed and found the award deficient, stating:

> The arbitrability question submitted to the arbitrator concerned whether the dispute in this case, which involved a work assignment and allegations by the union that such assignment was made in violation of specific provisions of the parties' negotiated agreement, could be properly subject to arbitration. Section 7106 of the [Act], on which the arbitrator relied in finding the dispute nonarbitrable, specifies and enumerates rights which are reserved to Management. However, *nothing in section 7106 precludes an arbitrator from reaching the merits of a grievance* in cases *where, as in this case, the union has alleged a violation of certain specified provisions of a collective bargaining agreement*. Thus, while an arbitrator may find, on the merits of the grievance, that there has been no violation of the specified provisions of the agreement because the actions taken by Management which gave rise to the grievance were within the ambit of the rights reserved under section 7106, or that, while there has been a violation, the scope and nature of possible remedies available to the arbitrator is limited by section 7106, *nothing in section 7106 in and of itself prevents an arbitrator from deciding if there has been a violation of a particular contract provision*.[24]

The *Department of Labor* and *Marine Corps Logistics Support Base* decisions demonstrate how carefully the FLRA will protect the broad scope of arbitration awards. Absent a clear exclusion by the parties, of arbitration awards. Absent a clear exclusion by the parties, the statute, or the CBA, an issue will be subject to arbitration under the Act. The fact that the grievance involves a protected management right will only effect the potential remedy and will not limit the arbitrator's authority to rule on the merits of the grievance. The only effective means for management to remove an issue from the scope of grievance and arbitration is to negotiate a specific exclusion into the CBA.

Aside from the Act, the arbitrator must insure that his award conforms with other applicable laws. There are a multitude of laws which should be considered.

The Back Pay Act

Among the more troublesome considerations for arbitrators are the limitations on awards in cases involving unjustified personnel actions which result in a loss of an employee's pay. When the arbitrator awards back pay, the FLRA will require the award to strictly conform to the requirements of the Back Pay Act.[25] In two decisions involving the

[21] *Id.* at 2 (citing 5 U.S.C. § 7121(c)(4) (Supp. III 1979)). 5 U.S.C. § 7121(c)(4) (Supp. III 1979) provides in pertinent part that "[t]he preceeding subsections of this section shall not apply with respect to any grievance concerning . . . any examination."

[22] 4 FLRA No. 51, at 7.

[23] Marine Corps Logistics Support Base, 3 FLRA No. 61 (1980).

[24] *Id.* at 3 (emphasis added).

[25] 5 U.S.C. § 5596 (1976 & Supp. III 1979).

Social Security Administration, the FLRA provided an indication of the range of possible issues which may arise under the Back Pay Act. In *Social Security Administration, St. Paul, Minnesota*,[26] the employee was denied a within-grade increase and was not recommended for the GS-10 journeyman level of her career ladder because of poor work performance. During the grievance process, management granted the within-grade increase but denied the career ladder promotion. The denial of promotion issue was submitted to arbitration. The arbitrator found that management had violated the CBA by failing to reasonably and substantially develop, communicate, and implement criteria to institute the activity career ladder plan. Because management had violated the CBA, the arbitrator *presumed* the grievant was qualified for promotion at the end of her one year at GS-9 and required management to rebut that presumption by clear and convincing evidence. The arbitrator ruled that management had not met its burden of proof and ordered the grievant retroactively promoted with back pay.

The FLRA found the award contrary to the Back Pay Act. Under this statute, an award of retroactive promotion and back pay is only available when the facts demonstrate that "the employee would have received the promotion had the employee not suffered an unjustified or unwarranted personnel action."[27]

To award retroactive promotion and back pay, the arbitrator must find that the employee suffered an unjustified or unwarranted personnel action *and* that "but for" such action the employee would have been promoted. In this case, the arbitrator did not find that "but for" the failure of management to properly institute the career ladder plan under the CBA the employee would have been promoted. Although the unusual presumption of promotion and burden of proof established by the arbitrator were not addressed directly, the FLRA did voice its view of what is necessary to support an award of back pay. In cases such as this

> *it is necessary to reconstruct,* on the basis of the evidence presented, *what the responsible agency officials would have done if the unwarranted actions had not occurred.* Thus, in this case, in order to award a retroactive promotion and back pay in accordance with the Back Pay Act, the arbitrator had to find that if the career ladder had been properly instituted, management would have promoted the grievant in 1979. However, the record evidence as set forth by the arbitrator indicates that in any event management would not have promoted the grievant because her work performance was deficient.[28]

This standard indicates that management can prevail in back pay cases by demonstrating that it would not have promoted the grievant regardless of the unwarranted or unjustified personnel action. To take advantage of the standard, management representatives must demonstrate arbitration through the testimony of selecting officials or other appropriate means, what the status of the employee would have been had the unwarranted personnel action not occurred.

While this decision concerned the "but for" determination, the second Social Security decision concerned whether the failure to timely promote an employee is an "unjustified or unwarranted personnel action" under the Back Pay Act.[29] The employee was promoted but the promotion was delayed for nine days when the necessary forms were lost in transmittal from the area office to the regional personnel office. The arbitrator found that, once the employee's district manager had determined promotion was warranted and had approved the promotion, management was obligated to perform those ministerial functions necessary to effect the promotion as soon as possible after the employee met the eligibility requirements. Because management had failed to timely complete the ministerial functions, the employee's promotion was delayed. To remedy the error, the arbitrator ruled that the employee's promotion had occurred nine days earlier than was reflected in the records and awarded retroactive promotion

[26] 7 FLRA No. 97 (1982).

[27] *Id.* at 3 (citing Veterans Admin. Hosp., 4 FLRA No. 57 (1980)).

[28] *Id.* at 3, 4 (emphasis added).

[29] AFGE, San Francisco Region, 7 FLRA No. 98 (1982).

and back pay. The FLRA agreed and stated that the Back Pay Act provided authority to award a retroactive promotion and back pay to correct an administrative or clerical error.[30] The only requirements are that the official having the authority to approve the promotion must have done so and the formal ministerial acts to effect the promotion must have been untimely.

As defined by the Back Pay Act, "personnel action" includes the omission or failure to take an action or to confer a benefit and is not limited to reductions, removals, reductions in force, or other affirmative personnel actions taken by management.[31] Consistent with this definition, the FLRA has held that the failure to provide training to effect a career development program is a "personnel action" within the meaning of the Back Pay Act.[32] Consequently, failure to properly institute affirmative action plans, career ladder plans, or other training and promotion may provide a basis for an award of retroactive promotion and back pay. When analyzing a grievance alleging an unwarranted or unjustified personnel action, management representatives must consider not only affirmative actions taken, but also whether the grievance includes an unfulfilled management obligation to take action or confer a benefit upon the employee. If there is an unfulfilled obligation, management should remedy the deficiency during the grievance procedure. Resolution prior to arbitration will avoid the cost of arbitration and the risk of an expensive adverse award.

The Back Pay Act also provides for the payment of reasonable attorney's fees in certain cases.[33] In *Department of Defense, Dependent Schools*, the FLRA rejected a union exception which complained of the arbitrator's denial of attorney's fees. The FLRA stated that the Back Pay Act provides for the payment of attorney's fees when an employee is found to have been aggrieved by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of the employee's pay. Because the arbitrator found no such unjustified or unwarranted personnel action, the necessary threshold determination had not been met and the payment of attorney's fees was not authorized.

In cases where the award of attorneys' fees is appropriate and the employee is the prevailing party, the standards for the award require the arbitrator to determine that payment of the employee's attorneys' fees is warranted in the interest of justice or that the agency's action was clearly without merit.[35] If the employee is the prevailing party and the arbitrator finds management discrimination on the basis of race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation,[36] the payment of attorneys' fees must conform with the standards established in the Civil Rights Act of 1964.[37]

Although the Back Pay Act provides authority for the arbitrator to award lost pay to an employee, it does not authorize the arbitrator to award lost pay to an unsuccessful applicant for employment.[38] Nor does it provide authority to pay for a period of wrongful classification,[39] or for interest on any amont properly awarded unless authorized by an express provision in a relevant statute or contract,[40] or for "per diem" reimbursement payments when the employee never incurred an expense for which reimbursement would have been paid.[41] The Back Pay Act provides an effective remedy to make an aggrieved employee whole, but only if the arbitrator makes specific eligibility determinations.[42] The management ad-

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[30] *Id.* at 2.

[31] 5 U.S.C. § 5596(b)(3) (Supp. III 1979).

[32] National Lab. Rel. Bd. Union, Local 19, 7 FLRA No. 7 (1981).

[33] 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979).

[34] 3 FLRA No. 40 (1980).

[35] 5 U.S.C. § 7701(g)(1) (1976).

[36] *Id.* at § 7701(g)(2); *id.* at § 2302(b)(1).

[37] 42 U.S.C. § 2000e-5(k) (1976).

[38] Federal Employees Metal Trades Council, 3 FLRA No. 90 (1980).

[39] United States Army Aviation Center, Fork Rucker, Ala., 6 FLRA No. 35 (1981).

[40] Portsmouth Naval Shipyard, 7 FLRA No. 9 (1981).

[41] Community Serv. Admin., 2 FLRA No. 87 (1980).

[42] *See* Celmer, Back Pay Awards in the Federal Sector, 81 Fed. Lab. Rel. Rep. Highlights No. 7 (May 1981).

vocate must ensure that back pay is not provided except in these appropriate circumstances.

Other Applicable Laws

Depending upon the facts in each case submitted to arbitration, other laws may be applicable. For instance, when an arbitrator considers a dispute involving payment of overtime, the award must conform to those statutes addressing overtime.[43] Similarly, an award must be modified to conform to the statute regulating the use of public vehicles if it wrongfully directs a commander to provide transportation for employees to and from the work site without obtaining approval by the Secretary of the Army.[44] An award of punitive damages is also contrary to law.[45] The FLRA has even considered an exception asserting an award was contrary to the First Amendment of the United States Constitution.[46]

While not exhaustive, these decisions demonstrate the broad range of laws to which an arbitrator's award must conform. The facts of each case determine which laws apply, and management representatives must be prepared to inform and educate the arbitrator of those laws. In addition, management representatives must make timely exceptions to an award which is contrary to law to avoid a situation in which the commander is required to disobey a binding arbitration award in order to obey the applicable law.

Contrary to Rule or Regulation

The arbitrator's award must also conform to applicable rules and regulations. The application of the requirement is not as simple as it would seem; the determination of what constitutes a "rule or regulation" within the meaning of the Act is not easily made. Although the FLRA has not defined the term "rule or regulation", it has addressed whether non-government rules and government-wide rules are "rules or regulations" as used in the Act. In the case of non-government rules, the FLRA decided that the "Voluntary Labor Arbitration Rules of the American Arbitration Association" are not "rules or regulations" within the meaning of the Act.[47] On the other hand, the FLRA has consistently held that the government-wide Federal Personnel Manual (FPM) is a "rule or regulation" to which an arbitration award must conform. For example, in *National Labor Relations Board Union*,[48] the arbitrator directed management to rerun a promotion action and promote the candidate with greater seniority.[49] Because the FPM reserves to management the discretion to decide which candidate it will select or not select, the FLRA set aside the award as denying management its reserved discretion contrary to a "rule or regulation" within the meaning of the Act.[50]

There are no FLRA decisions addressing agency regulations, such as Department of defense (DoD) Regulations, or the regulations of an agency's primary national subdivision, such as Department of the Army Regulations. When the question has arisen, the FLRA has resolved the issues on other grounds and declined to decide whether the specific rule or regulation is a "rule or regulation" under the Act.[51] This causes difficulty when attempting to determine whether an arbitrator may grant an award contrary to an agency regulation.

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[43]Federal Aviation Admin., 2 FLRA No. 87 (1980).

[44]Local 1688, IBEW, 5 FLRA No. 8 (1981). See 10 U.S.C. § 2632 (1976).

[45]Office of Econ. Opportunity, FLRC No. 75A-23, 3 FLRC 851 (1975).

[46]San Antonio Air Logistics Center, 6 FLRA No. 74 (1981). Interestingly, the award included the payment of damages by the union to the activity for losses caused by union conduct violative of the CBA. This portion of the award was sustained by the FLRA.

[47]Social Sec. Admin., 7 FLRA No. 82, at 4 (1982).

[48]7 FLRA No. 87 (1982).

[49]*Id.* at 3.

[50]*Id.* at 3, 4.

[51]*See, e.g.*, Social Sec. Admin., St. Paul, Minn., 7 FLRA No. 97, at 2 n.6 (1982) ("The Authority need not, therefore, decide whether the regulation cited by the Agency constitutes a 'rule or regulation' within the meaning of [the Act]."). *See also* Social Sec. Admin., 5 FLRA No. 33, at 5 (1981); Department of the Air Force, McGuire Air Force Base, 6 FLRA No. 50, at 2 (1981). Nor does the legislative history of the Act provide a clear explanation of what rules or regulations will constitute "rules or regulations" within the meaning of the Act. *See* note 11, *supra*.

The problem is particularly significant for the military because of the large body of DoD and military department regulations. The standards applied under the Order by the FLRC provide some insight as to how the question may be addressed by the FLRA.

While acting as the Executive Director of the FLRC, Mr. Henry B. Frazier, III, discussed the effect of regulations on arbitral awards.[52] Because of the similar standards established in the Order and the Act and because Mr. Frazier is now a member on the FLRA, there is a strong possibility that the analysis and results reached by the FLRC will be given continued vitality by the FLRA. As the FLRA currently requires under the Act, the FLRC required awards to conform with government-wide regulations.[53] However, the FLRC requirements changed when the regulation in question was an internal agency regulation. Mr. Frazier identified two FLRC decisions which defined the FLRC's view of the arbitrator's obligation to conform his award to these regulations.[54]

The first decision involved a Federal Aviation Administration (FAA) Order which delegated agency management discretion to determine the adequacy of employee parking and which had been specifically incorporated into the CBA.[55] A grievance arose questioning the adequacy of employee parking and was referred to arbitration. The arbitrator interpreted the FAA Order in a manner inconsistent with the FAA regional director's interpretation. The FAA took exception to the award asserting that the arbitrator did not have authority to interpret the FAA Order, and because the FAA Order was included in the parking provision of the CBA, the arbitrator could not interpret or apply the CBA parking provision. The FLRC disagreed, stating that when an agency agrees to incorporate a regulation into a CBA with an arbitration procedure, it also agrees that grievances concerning the interpretation and application of the regulation are subject to arbitration.[56] In Mr. Frazier's words: "the arbitrator had authority to interpret and apply the FAA regulation as if it was a provision of the negotiated agreement."[57]

The second case involved an Air Force regulation which provided that reprimands were to be temporarily recorded in the employee's Official Personnel Folder for two years.[58] Unlike the FAA Order, the Air Force regulation had not been incorporated into the CBA but was submitted to the arbitrator by the parties as a joint exhibit.[59] The arbitrator was asked to determine whether the reprimand for twice violating safety regulations was "for just cause and administered in a fair and equitable manner" and "[i]f not, what should the remedy be?"[60] The arbitrator determined that the Air Force had just cause to discipline the grievant for his second violation of safety regulations but that the penalty was too severe. The arbitrator ordered the written reprimand to be filed for one year instead of the two years contemplated by the regulation.[61]

Management appealed to the FLRC, arguing that the award violated an "appropriate regulation" by reducing the filing period for the reprimand to less than the minimum two years.[62] The FLRC rejected the agency's argument and decided "where . . . an arbitrator . . . considers an *agency* regulation which deals with the same subject matter as the provisions in the [CBA] and which was introduced by the parties . . . and thereafter considers and applies that regulation in reaching his judgment in the case, the agency may not challenge the application of that regulation before the [FLRC]."[63]

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[52]Frazier, *supra* note 8, at 730-33.

[53]*Id.* at 730.

[54]*Id.*

[55]Federal Aviation Admin., Dep't of Transp., FLEC No. 74A-88, 3 FLRC 452 (1975).

[56]*Id.* at 3, 3 FLRC at 455.

[57]Frazier, *supra* note 8, at 731.

[58]AFGE, Local 2612, FLRC No. 75A-45, 3 FLRC 822 (1975).

[59]*Id.* at 2, 3 FLRC at 824.

[60]*Id.* at 1, 3 FLRC at 823.

[61]*Id.* at 2, 3 FLRC at 824.

[62]*Id.* at 4, 3 FLRC at 826.

[63]*Id.* at 6, 3 FLRC at 828 (emphasis added).

These two decisions establish that, under the Order, an arbitrator could interpret and apply internal agency regulations whether or not the regulations were incorporated into the CBA. Further, the arbitrator could interpret and apply the internal agency regulation in a manner contrary to the agency's interpretation of its own regulation. If the FLRA follows the law established under the Order, an internal agency regulation ordinarily would not be a "rule or regulation" to which the arbitrator must conform his award under the Act.

The differing treatment given government-wide and internal agency regulations balances the need to insure consistent application of government-wide policies against the need to provide arbitrators with the broad authority necessary to resolve grievances. Under the Act, a grievance includes "any claimed violation, misinterpretation or misapplication of *any . . . regulation affecting conditions of employment.*"[64] This definition allows the challenge of agency actions under any regulation whether it is government-wide or internal. In the case of government-wide regulations, the need to insure consistent application throughout the government controls and the arbitrator must apply the regulation in the same manner as it is applied in all other agencies. Internal agency regulations are intended to apply only to agency operations and there is no need to insure consistent application throughout the government. Consequently, the need to provide the arbitrator with broad authority controls and the award need not conform to the regulations. Further, requiring the award to conform to internal agency regulations would be detrimental to the arbitration process. With such a requirement, the agency would no longer be an equal party with the union at arbitration. The outcome of every arbitration concerning interpretation and application of an agency regulation would be dictated by the agency. Such a result would not promote the resolution of grievances as the arbitration process was intended to do. Under the circumstances, management should anticipate that the FLRA will follow the FLRC and not require awards to conform to internal agency regulations.

[64]5 U.S.C. § 7103(a)(9)(C)(ii) (Supp. III 1976) (emphasis added).

The FLRA may reach a different result if it has previously been determined during negotiations that a compelling need exists for the agency regulation,[65] or if the regulation constitutes an exercise of a protected management right.[66] However, management representatives should assume the arbitrator will not be bound by the agency's regulation and should present evidence and argument to show that the agency action is appropriate under the facts presented at arbitration.

On Other Grounds Similar to Those Applied by Federal Courts in Private Sector Labor Management Relations

The FLRA has recognized five private sector grounds upon which an arbitral award may be reviewed and, and if found deficient, set aside or modified. The FLRA places a heavy burden on the petitioning party to demonstrate that the award is deficient on the grounds alleged. Each of the grounds recognized is discussed separately below.

The Arbitrator Exceeded his Authority

In *McGuire Air Force Base*,[67] the FLRA recognized that an award is deficient if the arbitrator exceeded his authority. As an example, the FLRA stated an award would be deficient "when it is demonstrated that the arbitrator rendered the award in disregard of a plain and specific limitation on his or her authority."[68] Even though the FLRA recognized this ground in *McGuire Air Force Base*, it sustained the award because the "petition fails to describe the facts and circumstances necessary to support its exception that in rendering the award . . . the arbitrator exceeded a limitation on his authority."[69]

In *Community Services Administration*,[70] the union objected to the agency's filling of vacant

[65]*Id.* at § 7117; Frazier, *supra* note 8, at 732.

[66]5 U.S.C. § 7106 (Supp. III 1976); Frazier, *supra* note 8, at 733 n.163.

[67]Department of the Air Force, McGuire Air Force Base, 3 FLRA No. 38 (1980).

[68]*Id.* at 3.

[69]*Id.*

[70]Community Serv. Admin., 5 FLRA No. 32 (1981).

positions as Schedule A Expected Service positions instead of following the CBA's competitive merit procedures. As a precondition to appoint under Schedule A, other staffing resources or authorities must not be available within the agency.[71] Because the parties had not provided guidance as to how this precondition was to be applied, the arbitrator formulated and applied his own "rule of reason." He determined the precondition is met if the agency could detail encumbent employees to the positions only at serious cost to its own regular operations. The FLRA rejected the union's claim that the development and application of a "rule of reason" exceeds the arbitrator's authority. When no guidance is provided by the parties, the FLRA considers the exception to be a disagreement with the arbitrator's reasoning and conclusion, which is not a basis for finding the award deficient.[72] Unless the parties provide specific guidance, the arbitrator does not exceed his authority by developing his own rules for application of a relevant regulation. Similarly, an arbitrator does not exceed his authority by granting an award on the general subject matter submitted to him when the parties cannot agree upon the specific issue to be decided.[73]

Under the Order and presumably under the Act, an arbitrator could be found to have exceeded his authority if his award went beyond a clear limitation in the issue submission agreement,[74] if the award determined an issue not reasonably within the questions submitted to the arbitrator,[75] or if the effect of the award is to modify any of the terms of the CBA.[76]

To establish that the arbitrator exceeded his authority, it must be demonstrated that he or she disregarded a plain limitation on his or her authority or failed to limit himself to resolving the question submitted. To avoid adverse results, the management representative should attempt to insure that only the narrowest issue possible is submitted to the arbitrator. When agreement on an issue is not possible, the management representative should attempt to persuade the arbitrator that the issue offered by management is more appropriate than the issue offered by the union.

The Arbitrator Failed to Consider Pertinent and Material Evidence

This ground is essentially a fair hearing ground recognized by the FLRA.[77] However, it is limited to the failure to *consider* evidence and does not extend to a failure to *exclude* evidence.[78] This recognizes the liberal admission of evidence as the usual practice in arbitration. The admission of evidence which one party finds objectionable is not grounds for review of an arbitration award.[79]

To establish that the arbitrator has failed to hear pertinent and material evidence, a petitioner seeking review should demonstrate that:

(1) the petitioner offered the evidence for admission by the arbitrator; and,

(2) the evidence offered was material and relevant to the issue resolved by the arbitrator; but,

(3) the arbitrator expressly ruled that the evidence would not be admitted.[80]

The Award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible

The FLRA recognized this ground for review in *Veterans Administration Hospital*,[81] but sustained the award on the facts. In the discussion the FLRA stated that the petitioner must demonstrate

> that the award is ambiguous or that the award is contradictory or that implementa-

[71] *Id.* at 2, 1 n.2.

[73] *Id.* at 4.

[74] Department of the Interior, 6 FLRA No. 72 (1981).

[74] Pacific Sw. Forest 7 Range Experiment Station, 4 FLRC 198 (1976).

[75] Long Beach Naval Shipyard, 3 FLRC 83 (1975).

[76] National Lab. Rel. Bd. Union, 5 FLRC 286 (1977).

[77] National Border Patrol Council, 3 FLRA No. 62 (1980).

[78] *Id.* at 4.

[79] *Id.*

[80] Mid-America Program Serv. Center, 5 FLRA No. 34, at 7 (1981).

[81] Veterans Admin. Hosp., Newington, Conn., 5 FLRA No. 12 (1981).

> tion of the award is impossible as a result of the award being "unclear in its meaning and effect" or being "too uncertain in [its] effect to be [sustained]."[82]

To meet this standard, the petitioner has to establish that the award is actually impossible to implement. This demonstrates the reluctance of the FLRA to review arbitration awards.[83] Unless an award is so poorly phrased or so confusing that the parties do not know what was intended and cannot implement the award, the FLRA will not set the award aside.

The award is based upon a non-fact

The "non-fact" ground could better be labeled a "gross mistake of fact" ground, and was accepted as grounds for review in *Missile Material Readiness Command.*[84] In this decision, the FLRA determined that the facts did not support the claim that the award was based upon a non-fact and sustained the award.[85] In so ruling, the FLRA indicated that to overturn an arbitration award on the ground of "non-fact", the petition must demonstrate that the "fact" in question is a matter which is objectively ascertainable, is *the* "fact" upon which the award is based (central fact), is concededly erroneous, "but for" the arbitrator's misapprehension, a different result would have been reached, and the parties were not responsible for the arbitrator's misapprehension.[86]

Air Logistics Center[87] is an example of an arbitrator's award which is based upon a non-fact. The case involved a question of whether certain provisions of a 1975 Memorandum of Agreement, covering employees in the Security Police Operations Branch, survived as supplements to the 1978 Master Labor Agreement negotiated by the American Federation of Government Employees and the Air Force Logistics Command. The arbitrator, citing a separate locally negotiated 1977 Multiunit CBA, found that "the [Security Police Operations] unit . . . [is] now included in one GS-WG MULTI-UNIT CONTRACT . . ."[88] Because the arbitrator believed that the Security Police Operations bargaining unit was included in those units covered by the Multiunit CBA, he concluded that the previously negotiated Memorandum of Agreement had been superceded by the Multiunit CBA and did not survive as a supplement to the Master Labor Agreement. Accordingly, the arbitrator denied the grievance.[89]

The union filed an exception arguing the arbitrator had made "a gross mistake of fact" when he found that the Security Police Operations unit was included within the coverage of the Multiunit CBA. The FLRA agreed. The Multiunit CBA to which the arbitrator referred provided in relevant part:

> Section 2 . . .
>
> a. The Wage Grade unit definition is: All employees in the Wage Grade classification, Kelly Air Force Base, Texas, serviced by the San Antonio ALC (formerly SAAMA) Civilian Personnel Office *except* . . .
>
> (1) Security Police Operations Branch (AFGE Local 1617)[90]

The FLRA found that, contrary to the arbitrator's finding, the Multiunit CBA clearly and unequivocally excluded the Security Police Operations unit from its coverage.[91] Because the arbitrator had erroneously believed the Security Police Operation unit was covered by the Multiunit CBA, he had concluded that the CBA superceded the earlier Memorandum of Agreement. Therefore, he never compared the disputed sections of the Memorandum of Agreement with the Master Agreement to reach the actual issue of whether the specified provisions of the Memorandum survived

[82] *Id.* at 3.

[83] Frazier, *supra* note 8, at 746.

[84] 2 FLRA No. 60 (1980).

[85] *Id.* at 6.

[86] *Id.*

[87] 6 FLRA No. 54 (1981).

[88] *Id.* at 2.

[89] *Id.* at 3.

[90] *Id.* at 2 (emphasis added).

[91] *Id.* at 4.

the later Master Agreement. The FLRA ruled that "the central fact underlying . . . the Arbitrator's award in this case is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached and that therefore . . . it must be set aside."[92]

The "non-fact" ground provides the parties with grounds to appeal an award when the arbitrator's award is clearly the direct result of a gross mistake of fact. It does not provide the parties with an opportunity to relitigate the merits because of disagreement with the arbitrator's interpretation of the facts.[93] Exceptions sustained on the "non-fact" ground will be limited to those few cases where it is clear that the arbitrator was completely mistaken in the conclusion of fact upon which the award was based.

The Award does not draw its essence from the CBA

In its simplest form, arbitration is a process whereby the parties to a contract submit a dispute arising from the contract to an impartial arbitrator for resolution. Since the rights and obligations of the parties grow from the contract, the arbitrator's award must be reasonably based upon the contract.[94] If the award is based upon a reasonable reading of a labor-management CBA, the federal courts, and consequently the FLRA, will not overturn the award even if their reading of the CBA would be different than the arbitrator's.[95] In those cases in which it is demonstrated the award does not draw its essence from the CBA, the FLRA will set aside the award.[96]

Overseas Education Association[97] involved a dispute over whether the union president was required by the CBA to take 90 days of "release time" before he was allowed to take any Leave Without Pay (LWOP) to account for his time expended in conducting labor-management business. The CBA provided only the two options of "release time" and "LWOP".[98] The arbitrator decided that the CBA did not require the Union President to exhaust the 90 days of release time before he would be allowed to take LWOP. He directed "that the disputed days . . . are changed to 'excused from duty without loss of pay and without charge to leave' and are not to be counted as any of the 90 days of release time in full pay status."[99] The agency filed an exception alleging the award failed to draw its essence from the CBA. The FLRA agreed, stating the standards for the grounds as:

> (1) the award cannot in any rational way be derived from the agreement; or
>
> (2) is so unfounded in reason and fact, so unconnected with the wording and purpose of the CBA as to manifest an infidelity to the obligation of the arbitrator; or
>
> (3) that it evidences a manifest disregard of the agreement; or that,
>
> (4) on its face, the award does not represent a plausible interpretation of the contract.[100]

Applying this standard to the case, the FLRA found that, instead of fashioning an award which conformed to the two options of pay status provided by the CBA, the arbitrator created a third option for days which are " 'excused from duty without loss of pay and without charge to leave' and [which] are *not* to be counted as any of the 90 days of release time in full pay status."[101] Under the circumstances, the arbitrator disregarded the terms of the CBA by creating a pay status for which there was no rational basis in the CBA.[102]

This ground insures the arbitrator interprets and applies the terms of the CBA. An award which abandons the CBA will be set aside as not drawing its essence from the CBA. The standards estab-

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[92] *Id.*

[93] Missile Material Readiness Command, 2 FLRA No. 60 (1980).

[94] United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

[95] *Id.*

[96] Missile Material Readiness Command, 2 FLRA No. 60 (1980).

[97] Overseas Educ. Ass'n, 4 FLRA No. 17 (1980).

[98] *Id.* at 5.

[99] *Id.* at 4.

[100] *Id.* at 5.

[101] *Id.*

[102] *Id.* at 5, 6.

lished, however, do not allow the parties to challenge an award merely because of disagreement with the arbitrator's interpretation of the CBA.

Other Grounds

In cases where an arbitration award is objectionable, but the objectionable portion does not fall within any of the recognized grounds, the FLRA will expect the petitioner to cite private sector cases in which federal courts have sustained exceptions on the grounds asserted.[103] If this is done, the exception is within the review authority of the FLRA.[104] Thus, it is important that management representatives not limit their research to grounds recognized by the FLRA. They may properly assert any other grounds presently unrecognized by the FLRA but accepted by federal courts in private sector labor-management relations. As a starting point, management representatives should review federal cases which consider vacation of awards under the Federal Arbitration Act.[105]

Conclusion

The FLRA will afford the arbitrator broad authority to consider evidence and fashion remedies in resolving disputes. Consistent with the intent of Congress, the FLRA will enhance the finality of arbitration awards by exercising only limited review authority and setting aside an award only when the award is clearly deficient. Against this background the commander must recognize the importance of the grievance procedure in resolving disputes before the matter is submitted to arbitration. If the grievance is not resolved, the matter may be submitted to arbitration which may result in an arbitrator making an award which management does not want to accept. Management advisors should assist the commander in determining the facts and seeking alternatives acceptable to both parties. If grievances are denied only after there has been a full development of the facts and exhaustion of the search for alternatives, only those cases in which the facts support management's position will be submitted to arbitration and the risk of adverse results will be greatly reduced.

The initial grievance steps emerge as the critical stage of grievance arbitration. Only then can management adjust, compromise, and settle critical command problems concerning the civilian work force. When the problem goes to arbitration, the final decision is out of the hands of the commander and will be made by a third party who does not share the commander's responsibility for the effective and efficient operation of the organization. Only when resolution of the grievance is impossible should the commander allow an arbitrator "to tell him how to run his post."

[103]Federal Aviation Sci. and Tech. Ass'n, 3 FLRA No. 88, at 3 (1980).

[104]5 U.S.C. § 7122(a)(2) (Supp. III 1979).

[105]9 U.S.C. §§ 1-14 (1976). Grounds for vacation of awards are established at *id.* at § 10.

McCarty vs. McCarty: Retroactive?

Captain Jack F. Nevin, JAGC, USAR
147th General Support Group, Fort Lawton, Washington

Held: Federal law precludes a state court from dividing military retired pay pursuant to state community property laws.[1]

Since the United States Supreme Court rendered this landmark decision in *McCarty v. McCarty*[2] on 26 June 1981, legal assistance officers have been besieged by questions from servicemembers and retirees concerning its meaning and scope. The majority of inquiries have pertained to the retroactivity of the Court's decision. At issue is whether a retiree, whose divorce decree requires the division of military retired pay, can now unilaterally stop payments. In *McCarty*, the Court

[1]McCarty v. McCarty, 453 U.S. 210 (1981). This article has been prepared as a follow-up to Nevin, McCarty v. McCarty: *What Does the Future Hold?*, The Army Lawyer, June 1981, at 12.

[2]453 U.S. 210 (1981).

neither limited its decision to prospective cases, nor expressly provided for retroactive application. A number of state courts have addressed the question of the retroactivity of *McCarty*.[3] Unfortunately, there is no consensus among these decisions. This article will briefly review how various state courts have interpreted and applied *McCarty*.

Stipulated Property Settlements

During the pre-*McCarty* era, many servicemembers and retirees agreed to the division of their retired pay in stipulated property settlements which were subsequently incorporated into divorce or dissolution decrees by the courts. In many of these cases, the servicemember or retiree was advised by counsel that the division of military retired pay as community property was a litigable issue. Nonetheless, the prudent attorney probably also informed the client that virtually all of the community property states in the United States had definitely decided this issue at the state supreme court level.[4] After *McCarty*, however, several servicemembers and retirees who had stipulated to a division of their retired pay initiated collateral attacks on their divorce decrees.

In *In re Marriage of Mahone*,[5] the husband had stipulated at trial that his military retirement pension could be divided as community property. The Texas Court of Appeals held that *McCarty* could not be used retroactively to attack the decision even though the appeal in the case was not final when *McCarty* was decided. The court stated: "The stipulation was in accordance with the law as it stood and the husband is not entitled to relief from the stipulation only because the law was changed by judicial decision."[6]

A California Court of Appeals reached a similar conclusion in *In re Marriage of Sheldon*,[7] which involved the issue of retroactive effect of the *McCarty* decision on a divorce decree pending appeal when *McCarty* was decided. The court of appeals refused to apply *McCarty* retroactively unless the spouse had requested the trial court to reserve jurisdiction on the character of the property interest in the pension. In *Sheldon*, however, there had been an admission by the husband that the retirement benefits constituted community property. The court employed a three-prong analysis in arriving at its conclusion that the decision was not retroactive: First, the *McCarty* decision was a new principle of law that overruled longstanding California precedent. Therefore, this was not a basis for retroactivity. Secondly, the harm to federal interest that *McCarty* sought to eliminate was prospective in nature, *i.e.*, any retroactive effect would be on those already retired and not within the scope of protective federal interest. Finally, retroactive application would not be in the best interests of family law. To retroactively litigate property settlements would disrupt the need for stability and finality in family law matters. A very important point alluded to was the potential for reallocation of property interests resulting in "changed circumstances" which could in turn force relitigation of spousal support awards.[8]

The latter point may be an omen for all attorneys to ponder before charging ahead at full speed to relitigate a *McCarty* issue. In effect, *Sheldon* requires a purely prospective application of *McCarty* in California.

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[3]Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981); Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981) (appeal in partition suit on preemption issue pending as of *McCarty*); Jeffrey v. Kendrick, 621 S.W.2d 207 (Tex. Civ. App. 1981) (divorce division); Powell v. Powell, 620 S.W.2d 253 (Tex. Civ. App. 1981) (partition); Sandoval v. Sandoval, 8 Fam. L. Rep. 2024 (Ariz. Ct. App. 1981); Hill v. Hill, 8 Fam. L. Rep. (BNA) 2026 (Md. Ct. App. 1981); *In re* Mahone, 176 Cal. 274 (Ct. App. 1981); *In re* Sheldon, 177 Cal. 380 (Ct. App. 1981); *Ex parte* Buchanan, 626 S.W.2d 65 (Tex. Civ. App. 1981); *Ex parte* Acree, 623 S.W.2 810 (Tex. Civ. App. 1981).

[4]California: *In re* Marriage of Milhan, 27 Cal.3d 765 (1980); *In re* Marriage of Fithian, 10 Cal.3d 592 (1974) Idaho: Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975); Louisiana: Moon v. Moon, 345 So.2d 168 (La. Ct. App. 1977). Washington: Morris v. Morris, 419 P.2d 129 (Wash. 1975). Arizona: Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979). New Mexico: Stephens v. Stephens, 595 P.2d 1196 (N.M. 1979). Texas: Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

[5]123 Cal. App.3d 17 (1981).

[6]*Id.* at 22.

[7]Civ. No. 22645, D136107 (Cal. Ct. App., 4th App. Dist. 1981).

[8]*Id.*, slip op. at 3.

Contempt Proceedings

In *Ex parte Buchanan*,[9] the former spouse was awarded a share of her ex-husband's military retirement pay "if and when received" as part of the court awarded property settlement. The servicemember had retired in September, 1980 and paid his ex-wife a share of his retirement until May, 1981. At that time he willfully stopped all payments. A contempt proceeding ensued, but was ultimately dismissed in a habeas corpus action.

In analyzing the retroactivity issue, the court concluded that the Supreme Court's decision in *McCarty* was not the preemptive action but rather a determination that Congress had preempted state judicial intervention when it enacted the military compensation legislation. The court cited the Texas Supreme Court's decision in *Ex parte Johnson*,[10] which involved Veterans Administration disability benefits. *Johnson* concerned a collateral attack to enforce the judicial award of a portion of an ex-spouse's Veterans Administration disability benefits which was disallowed on the basis of federal preemption.[11] The court in *Buchanan* reasoned that implicit in *Johnson* was a holding that the original order awarding a share of these benefits to the nonmilitary spouse was void. The *Buchanan* court concluded that any previous divorce decree dividing military retired pay as community property was similarly void. This decision has not been widely accepted even in Texas.[12]

In the federal system, at least one court does not agree with the *Buchanan* rationale. In *Erspan v. Badgett*,[13] the Fifth Circuit Court of Appeals found nothing in the *McCarty* ruling indicating that the Supreme Court "intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments."[14] The court reasoned that it therefore was without jurisdiction to reverse a 1963 Texas state divorce judgment.

In *Braden v. Reno*,[15] an Idaho district court decided that three factors should be considered in determining whether to apply *McCarty* retroactively. The court first analyzed the purpose of the *McCarty* ruling. The court reasoned that the purpose was to maintain an incentive for enlistment. The court further concluded that refusal to retroactively apply the case would in no way frustrate this purpose. Secondly, the court looked to the extent of reliance on prior precedent and the effect that retroactive application could have on this; it concluded that retroactivity would result in inequity and injustice. Finally, the court found that the administration of justice would be adversely affected by the relitigation of matters that have been closed for a long period of time. The latter two factors essentially echo the sentiments of the California courts in *Sheldon* and *Mahone*.

Effects of Res Judicata

An analysis of the retroactive applicability of *McCarty* would be incomplete without an examination of a court's perspective of the effects of the principle res judicata. Perhaps the most definitive statements applying res judicata is the case of *Federated Stores v. Moitre*.[16] This case involved an antitrust action originally initiated by the United States and subsequent suits filed by private individuals. The latter actions were dismissed and several individuals appealed. During the pendency of these appeals, the Supreme Court rendered a decision which seemingly supported the position espoused by the *Moitre* frustrated litigants. The non-appealing parties sought to take advantage of the new case law by contending that the doctrine of res judicata was not applicable; the Ninth Circuit agreed. However, the Supreme Court reversed, stating: "Nor are the res judicata consequences of a final unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[17] Applying this reasoning to the *McCarty* situation would

[9] 626 S.W.2d 65 (Tex. Civ. App. 1981).

[10] 591 S.W.2d 453 (Tex. 1979).

[11] *Id.* at 456.

[12] *Ex parte* Gaudion, ___ S.W.2d ___ (Tex. Civ. App. 1982).

[13] 659 F.2d 26 (5th Cir. 1981).

[14] *Id.* at 28.

[15] 8 Fam. L. Rep. (BNA) 2041 (1981). The court found these factors in Linkletter v. Walker, 381 U.S. 618 (1965).

[16] 452 U.S. 264 (1981).

[17] *Id.* at 268 (citing Angel v. Bullington, 330 U.S. 183, 187 (1947)).

likely result in a similar finding of nonretroactivity for cases not pending or subject to appeal on 26 June 1981.

Modification of Child and Spousal Support

Retroactive application of *McCarty* would without doubt result in sufficient changed circumstances that would permit additional litigation to modify child and spousal support decrees. All attorneys, civilian and military alike, should be aware of this potential when advising clients. *In re Marriage of Jones*,[18] a direct appeal decided after *McCarty*, illustrates this problem. In *Jones*, the trial court had awarded the ex-wife a percentage of the husband's military retirement. The Iowa Supreme Court modified the lower court's award, allowing the wife to receive the same amount as alimony.

Consideration of military retired pay in determining the division of the remaining marital assets or calculating the amount of support has been accepted by several other jurisdictions. Courts in Florida,[19] Missouri[20] and North Dakota[21] have applied this rule. *In Webber v. Webber*,[22] the Supreme Court of North Dakota remanded the case to the trial court for a review of all provisions relating to property distributions and alimony in view of *McCarty*. In dicta, the court ominously added: "This court has recognized that, where the circumstances require it, *all* of the property of a marriage may be awarded to one party."[23] A servicemember or retiree could retain all military retirement benefits at the expense of all of his or her interest in the marital assets. The impact of this approach to the division of marital assets would be most onerous on the active duty servicemember who retains no marital assets and fails to serve for sufficient time to receive a military pension.

Conclusion

Most courts have not applied the Supreme Court's decision in *McCarty* retroactively. Whether a court employs the overall analysis approach used by the California court in *Sheldon*, or the structured three-pronged test followed by the Idaho Court in *Braden*, there is sufficient, sound legal reasoning to support the non-retroactive application of *McCarty*. In addition, the retroactive application of this decision would open the "flood gates" of litigation and disturb long closed matters.

More than one year after the original decision, the question remains: Is *McCarty* retroactive? The majority of state courts say no. Will the Supreme Court have the opportunity to answer this question? Just as in *McCarty*, the prospect seems inevitable.

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[18]309 N.W.2d 457 (Iowa 1981).

[19]Higgins v. Higgins, 8 Fam. L. Rep. (BNA) 2200 (Fla. Ct. App. 1982).

[20]Bedwell v. Bedwell, 8 Fam. L. Rep. (B.N.A.) 2148 (Mo. Ct. App. 1981).

[21]308 N.W.2d 548 (N.D. 1981).

[22]*Id.*

[23]*Id.* at 549-50 (citing Bender v. Bender, 276 N.W. 2d 695 (N.D. 1975)).

Professional Responsibility Opinion: Case 81-1

The Judge Advocate General's Professional Responsibility Advisory Committee

Investigation of a complaint concerning a US Army Reserve JAGC Major has revealed that, in the complainant's case and two others, the respondent allegedly accepted representation of his Army legal assistance clients in his private practice on a fee basis without complying with the referral requirements of regulations governing the legal assistance program.

To date, these allegations remain undisputed and unexplained except for the respondent's assertion that he believed the complainant was referred to him at the legal assistance office as a private client. No evidence in support of that assertion has been offered. To the contrary, the direct and circumstantial evidence in the investigative file suggests to this committee that he knew or reasonably

should have known that the complainant was referred to him solely as a legal assistance client within the office.[1]

The regulation with which the respondent failed to comply provides as follows:

> In the United States, case referrals to members of the civilian bar should be made, as appropriate, to the client's family attorney, Lawyer Referral Service, Legal Aid and Public Defender Organizations, or to the Bar Association's Legal Assistance for Servicemen Committee. If none of the aforementioned is available, the client should be given the names of at least three attorneys so that he may select whomever he chooses.

Army Regulation 608-50 Personal Affairs: Legal Assistance, para. 4c (1974).[2]

Additional regulations, pertaining to all Army lawyers, provide as follows:

> A member or employee of the Army will not accept payment or other compensation (excluding DA pay and allowances) for providing legal service at any time or place to persons authorized to receive legal assistance at Army expense and *will not advise, recommend, or suggest to such persons that such persons should receive legal services from him while he is off duty or from anyone associated with him in practice unless such legal service will be furnished free of charge.* (emphasis added.)

Army Regulation 27-1, Legal Services: Judge Advocate Legal Service, para. 6*b* (1976). Certain possible applications of the quoted provisions to Reservists may be open to question.[3] However, it is the committee's view that the underscored portion can properly be applied to reserve judge advocates when they are in a military duty status, particularly under the circumstances disclosed by this case.

Accordingly, in addition to indicating that the respondent violated Army Regulation 608-50 by failing to refer clients to the existing Lawyer Referral Service when their apparent legal remedy exceeded the authorized limits of the Army legal assistance program, it appears that, implicitly if not expressly, the respondent must have suggested employment of himself on a fee basis as a private practitioner, in violation of the provisions of paragraph 6*b*, Army Regulation 27-1, quoted above.[4]

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[1]If the respondent's version is nevertheless correct, he would seem to have used government facilities for a private purpose in violation of the provisions of Army Regulation 600-50, Personnel—General: Standards of Conduct for Department of the Army Personnel, para. 2-4 (1977); *see also* Army Regulation 210-7, Installations: Commercial Solicitation on Army Installations (1978), for additional restrictions.

[2]The legal assistance program at the installation involved did not permit the attorneys to appear in court. Even if none of the clients had a family attorney, which we presume to be the case, the file establishes that the local area was served by both a Lawyer Referral Service and a Legal Aid Society. The file also reveals that, at the time of the complainant's visit, the legal assistance office maintained a referral document which listed not only the lawyer referral and legal aid organizations, but also the names of 36 lawyers in the city and surrounding counties, among whom was the respondent. Although the manner in which that document was used by the legal assistance officers was not described, the regulation seems clear: only if there were no referral service, legal aid, or local bar legal assistance committee could referrals to individuals be made. The list was later replaced by a handout for clients which described only the Lawyer Referral Service.

[3]Literally interpreted, the prohibition on accepting compensation might extend to legal services that the person clearly could not have received free under the legal assistance program, such as the incorporation of a business. Whether the regulation was so intended is not clear. An equally important consideration is whether the application of these restrictions to reservists is limited by title 5, United States Code, section 2105(d) (1976), which indicates that Reserves who are not in full time military service are not considered to be officers or employees of the Federal government, even when engaged in training duty and receiving pay, *see* note 7, *infra*; Woods v. Covington County Bank, 537 F.2d 804, 810-11 (5th Cir. 1976).

[4]Issues in addition to those discussed above arise from the complaint. However, the evidence so far adduced does not permit the committee to conclude whether the complainant or either of the other two clients was misled as to the need for court intervention with only inadequate efforts being made to resolve the nonsupport problem through military channels, whether the complainant reasonably believed that the respondent was handling her case free of charge under the legal assistance program even though there were no further contacts with him at or through military facilities, whether the complainant reasonably believed that her suit was not for divorce until her husband informed her otherwise, whether the "petition for dissolution of marriage" was in fact filed for the purpose of dissolving the marriage or for another purpose, such as to gain tactical advantage on the matter of nonsupport, and whether

From our consideration of Army regulations, we now turn to the ethical requirements of the American Bar Association (ABA) Model Code of Professional Responsibility, which has been adopted without material change in the respondent's jurisdiction.[5]

The ABA Committee on Ethics and Professional Responsibility has commented that, for a reserve legal assistance officer to represent one of his legal assistance clients in the same or a related matter in his capacity as a civilian attorney, could "[d]epending on the facts, . . . under certain circumstances, be unethical." ABA Formal Opinion 343, at 6 (1977).

The ABA Committee did not indicate what circumstances would make the representation unethical, but, in support of its observation, cited *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976).

In *Woods*, the court was considering a motion to disqualify a Navy Reserve lawyer, Commander Nichols, as attorney for the plaintiffs in a class action on the ground that he had investigated the subject-matter of the suit (a fraudulent securities scheme) as a matter of legal assistance while on Navy training duty. The court was concerned with Disciplinary Rule 9-101(B), ABA Model Code of Professional Responsibility, which states that a "lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[6] Upon considering the provisions of section 2105(d) of title 5, United States Code, the *Woods* court concluded that, in view of the "unmistakable congressional intent to protect reservists from being disadvantaged in employment merely because of their status as members of the armed services [,] . . . EC 9-3 and DR 9-101(B) are not applicable to reservists like Nichols who have been on active duty for training." 537 F.2d at 811.[7]

However, deciding that "Congress did not intend to relieve [reservists] of the ethical obligations of their respective professions," the court proceeded to determine whether some "specifically identifiable appearance of improper conduct" nevertheless warranted Nichols' disqualification. *Id.* at 812 *et seq*.

The court considered the policies underlying DR 9-101(B). Among those policies is "the need to discourage government lawyers from handing particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service." ABA Form Opinion 342 at 3-4 (1975) (footnote omitted); *cf*. ABA Formal Opinion 37 (1931), quoted by the *Woods* court, 537 F.2d at 814. Observing that a legal assistance officer's "preemi-

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the respondent complied with obligations to protect the rights under the Soldiers' and Sailors' Civil Relief Act of a defendant whom he knew to be absent in the military service. These issues, except possibly the last-mentioned, appropriately could be brought to the attention of local bar discipline authorities by the complainant, particularly since the respondent admittedly handled her case as a private practitioner. Moreover, the committee believes such questions could best be resolved in a forum in which the parties were available to testify and subject to cross-examination.

[5]We note that separate jurisdictions may differ in their interpretation of the Code of Professional Responsibility. *Cf*. United States v. Miller, 624 F.2d 1198, 1201-03 (3d Cir. 1980). Also, this committee has found no regulation expressly adopting the entire ABA Code for all legal assistance officers. *See* Army Regulation 608-50, para. 9 (refers only to ABA Canon 4); *cf*. Army Regulation 27-10, Legal Services: Military Justice, para. 2-31 (as amended 1981) (ABA Code applicable to all lawyers involved in court-martial proceedings).

[6]DR 9-101(B) implements Canon 9, which states that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," and Ethical Consideration 9-3, which advises that, "[a]fter a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." Only violation of the Disciplinary Rules, as distinguished from the Canons and Ethical Considerations, is regarded as a basis for professional disciplinary action under the Code. Preamble and Preliminary Statement, ABA Model Code of Professional Responsibility, at 1 (as amended 1978). Nevertheless, enforcing agencies may resort to the Canons and Ethical Considerations for interpretative guidance concerning the Disciplinary Rules. *Id*.

[7]Section 2105(d) provides as follows:

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

nent duty" is owed to the individual client rather than to the government, the court found no reasonable possibility that Commander Nichols' performance on active duty would have violated the public trust, concluding as follows:

> Because the Government has no direct interest in a legal assistance officer's relationship with his client, any ethical questions arising out of that relationship are best dealt with under those provisions of the Code which specifically delineate an attorney's obligations to his client. *See, e.g.*, A.B.A. Code of Professional Responsibility, Canons 4, 5, 6 & 7 (1970). Consequently, *where there is no claim that a legal assistance lawyer used his public office as a means of soliciting clients* or otherwise garnering lucrative cases, the Canon 9 limitation on a former government attorney should not be brought into play against apparently improper conduct occurring during his tenure with the Government. [Emphasis added.]
> 537 F.2d at 815.

This Committee does not agree with the *Woods* court's premise that the government has no direct interest in the officer's relationship with the clients. The efficacy of the military legal assistance program as a contributor to morale and discipline, and, consequently, its contribution to military effectiveness rests to a large degree on the efficiency with which legal problems are resolved and the confidence with which the program is viewed by its intended beneficiaries. If, for example, a lawyer participating in the program were to derive personal gain through unnecessarily advising clients to pursue possibly prolonged and costly remedies such as litigation beyond the scope of the program, the harm to the armed forces, albeit indirect, could be as great as the disservice to the individual client involved.[8]

In any event, there is an important distinction between the *Woods* case and this one. Although in *Woods* there was no claim that Commander Nichols had "used his public office as a means of soliciting clients," we are confronted with just such a claim. Evidence that the respondent accepted representation of several clients without full advice as to their options supports the claims.[9] While we agree that section 2105(d) of title 5, United States Code, precludes applying DR 9-101(B) as a complete bar in all situations involving reserve lawyers, this committee nevertheless believes that when a reserve judge advocate acting as a legal assistance officer undertakes private representation of a legal assistance client without either having complied with program regulations governing referrals or having afforded the client the information and opportunity needed to make an informed choice as to the selection of counsel (required by the authorities cited in note 9, *supra*), the strong appearance of improper conduct warrants the conclusion that the reservist's conduct constitutes a violation of Disciplinary Rule 9-101(B).[10]

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[8]An appearance of evil may debase the program. *Cf.* The Judge Advocate General's School, U.S. Army, Text of Instruction: Pre-Mobilization Legal Counseling for Reserve Components 7 (1977), which, in connection with a counselling program to be carried out by reserve judge advocates, advised that "[t]he Judge Advocate officer should not, however, refer the member to his own law firm or to himself as this would create the appearance *of* wrongdoing, which must be avoided if the program is to succeed." As previously noted, the possibility of misadvice clearly is present in this case, but the matter was not fully developed by the evidence, *see* note 4, *supra*, some of which indicates that, justifiably or not, the reserve lawyers staffing the legal assistance office had decided that the policy and procedures adopted by Army regulation for nonsupport cases were inadequate as a permanent remedy and that suit was necessary. *See*, however, Canon 8 (A Lawyer Should Assist in Improving the Legal System) EC 8-1, EC 8-2, and EC 8-9.

[9]As to ethical standards involved in the referral process, *see* ABA Formal Opinion 343, questions 7-9 at 2-3 (1977); *see also* EC 2-8, EC 2-15. In fairness to the respondent, we note that the file discloses that he informed some legal assistance clients that, being a reserve officer, he could not undertake to represent them in a private capacity.

[10]Besides the *Woods* case, we have noted Coles, Manter & Watson v. Denver District Court, 493 P.2d 374 (Colo. 1972) (en banc), in which the Colorado Supreme Court held it was not improper for former deputy public defenders to continue to defend on a private basis a criminal defendant whom they had been representing in the same case before leaving employment as public defenders. The court held that employment in a public defender's office was not the type of public employment contemplated in EC 9-3 and DR 9-101(B). (For critical commentary, *see* American Bar Foundation, Annotated Code of Professional Responsibility 429-30 (1979).) Even so, the court stated that any facts indicating the attorneys had solicited business or used the public defender's office as a "feeder" for private law business should be brought before it as a grievance for disciplinary procedures. 493 P.2d at 375-76.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Prior Convictions

Paragraph 75*b*(2), Manual for Courts-Martial, United States, 1969 (Rev. ed.), allows the trial counsel during the sentencing phase of trial to introduce previous convictions from the personnel records of the accused. Trial counsel must ensure that these convictions are final and that summary court-martial convictions show the accused was advised of his right to confer with counsel. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977). In *United States v. Gwin*, SPCM 16768 (A.C.M.R. 8 June 1982), the trial counsel introduced the accused's DA Form 2-1 which showed that the accused had been in confinement at Fort Hood, Texas and had been assigned to the U.S. Army Retraining Brigade. This entry on the DA Form 2-1 was held inadmissible because it could only result from a court-martial conviction which did not show compliance with *Booker*. Defense counsel's failure to object to this defect, however, constituted waiver. *United States v. Jackson*, SPCM 16852 (A.C.M.R. 8 June 1982). Trial counsel can still introduce the DA Form 2-1 showing reduction or time lost through unauthorized absence without complying with *Booker* because these entries do not necessarily result from a court-martial conviction. *United States v. Jaramillio*, ____ M.J. ____ (A.C.M.R. 30 April 1982).

2. Pretrial Negotiations

As part of the guilty plea procedure, the military judge must ascertain the existence of any pretrial agreement, determine whether his interpretation of any agreement comports with the accused's and counsels' interpretation, and make an inquiry into the existence of any *sub rosa* agreements. *United States v. Green*, 1 M.J. 453 (C.M.A. 1976). In *United States v. Williams*, ____ M.J. ____ (A.C.M.R. 11 June 1982), the court found that the trial judge met the *Green* requirements by reciting the obligations of the pretrial agreement to the accused and receiving counsels' assurances that their interpretation of the agreement comported with his. On appeal, appellant attacked his conviction, alleging an oral *sub rosa* agreement existed between trial defense counsel and the chief of military justice. While both parties agreed that there was a *sub rosa* clemency agreement, they differed as to the conditions of that agreement. Appellant, acting pursuant to the agreement, testified against his co-accused. The staff judge advocate made no recommendations for clemency although appellant understood the agreement to provide for a reduction in sentence.

Since the *sub rosa* agreement was not conditioned on a plea of guilty, the plea was not rendered improvident. However, appellant's understanding of the *sub rosa* agreement was enforced on appeal. The rationale was that the accused should receive the benefit of the doubt as to the terms of the *sub rosa* agreement where the government fails to bring this agreement to the attention of the trial judge or have it memorialized in writing.

Trial counsel can avoid this result by insuring that all pretrial negotiations and agreements are documented. Moreover, trial counsel must bring these agreements to the attention of the trial judge and clarify any differences he may have with the judge's interpretation of these agreements. *See United States v. Passini*, 10 M.J. 108 (C.M.A. 1980).

Voting Assistance Item

Federal Voting Assistance Program
Office of the Secretary of Defense

This is an election year, and as JAGC officers, you will receive questions from those in your command regarding voting rights. The following information will provide some background into military voting policy and procedure. This article is fashioned to make you aware of the various issues you will encounter between now and November 2.

Members of the military have the right to vote and are encouraged to exercise this right. The Federal Voting Assistance Act of 1955, as amended (42 U.S.C. 1973cc *et seq.* (1976)) and Executive Order 10646 are the legal foundations for the Federal Voting Assistance Program and its position within the Office of the Secretary of Defense. The act requires that states permit members of the military and their eligible spouses and dependents to register and vote absentee. Department of Defense Directive 1000.4 (1980) sets the responsibility of the military departments and agencies for management of the program. The 2 November 1981 memorandum of the Secretary of Defense to the Secretaries of the military departments and agencies contains specific direction for conducting the program for the 1982 elections.

The various military commands have organized their respective voting assistance programs in a manner best suited to fit in with their operational needs. Legal assistance officers may be called upon to advise both voting assistance officers and individual voters on any number of election related questions.

As a lawyer, you are already familiar with the legal concepts that the right to vote cannot be denied on the basis of race, sex, land ownership, or payment of taxes, but you may not be familiar with the following:

—Persons who otherwise qualify as bona fide residents of a state cannot be denied registration and voting rights merely because they reside on a military installation or federal enclave within the state. *Evans v. Cornman*, 398 U.S. 419 (1970).

—Military members who otherwise qualify as bona fide residents of a state may not be excluded from registering and voting on the sole basis that they moved into that state in the course of their military duties. *Carrington v. Rash*, 380 U.S. 89 (1965).

You should be alert to the fact that local election officials at times will refuse to permit servicemembers and their spouses to register and vote locally in person simply because they are living or working on a military base. When such an incident does occur you should contact the Federal Voting Assistance Office, Office of the Secretary of Defense.

Basic requirements for voting are that a person be a U.S. citizen, be at least 18 years of age, and be a resident of the district in which he desires to vote. Beyond these basics, however, the details regarding voting requirements vary from state to state. For example, some states require a military voter to register prior to voting; others do not. The *1982 Voting Assistance Guide* (DOD Gen 6I), prepared by the Federal Voting Assistance Office, contains summaries of the various state election laws and will be a useful tool to answer procedural questions.

The form most universally recognized by local election officials and most often used by servicemembers to communicate with local election officials is the Federal Post Card Application—referred to as the FPCA or Standard Form 76. It is available through each service's publication systems. Procedures for completing this form are contained in the *Voting Assistance Guide*.

You will be asked questions regarding the consequences of changing residency. Most persons think only in terms of the potential tax consequences of claiming one state for residence as opposed to another. You should be ready to discuss with them other potential consequences as well. For instance, one consequence often overlooked involves the status of property if dissolution of marriage should occur. Another involves the right to attend state schools and the tuition rates involved when

claiming one state over another for residency purposes.

Another question you will encounter is that regarding spouse's residence. A spouse does not need to have the same residence as the military member.

The principle of political neutrality calls for the military to remain free from involvement with partisan political campaigns and to avoid the appearance of supporting partisan political causes and candidates. *Greer v. Spock*, 424 U.S. 828 (1976). On the other hand, participation in the election process is promoted and encouraged by the military. The Department of Defense has issued directives regarding political activities and related areas. These include:

DOD Directive 1325.6	Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces.
DOD Directive 1344.10	Political Activities by Members of the Armed Forces.
DOD Instruction 5120.4	Policies and Guidelines Governing Armed Forces Newspapers and Civilian Enterprise Publications.
DOD Directive 5120.20	American Forces Radio and Television Service (AFRTS)
DOD Directive 5410.18	Community Relations
DOD Instruction 5410.19	Armed Forces Community Relations

The Federal Voting Assistance Office is prepared to assist you with any specific problems you may encounter. The office also provides an ombudsman service for both the voter and local election officials. Call autovon 225-0663 or commercial 202-695-0663 for assistance.

Legal Assistance Items

Major Joseph C. Fowler, Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell
Administrative and Civil Law Division, TJAGSA

1. Moving Expenses Tax Packet

Captain Katherine Bigler of the legal assistance office at Fort Leavenworth, Kansas, has developed a helpful tax packet on moving expenses that is distributed to all military personnel departing that post on permanent change of station. The material contained in the packet, along with a cover letter signed by the Commander, Combined Arms Center and Fort Leavenworth, is representative of the use of timely legal advice and command emphasis to accomplish an effective preventive law measure.

Legal assistance offices desiring a copy of the tax packet on moving expenses should request it from The Judge Advocate General's School, U.S. Army, Administrative and Civil Law Division, ATTN: ADA-LA, Charlottesville, VA 22901.

2. Legal Assistance Power of Attorney Videotape

The Legal Assistance Branch of the Administrative and Civil Law Division, TJAGSA, has produced a videotape entitled "Introduction to Powers of Attorney." This 7-minute-4-second videotape is the second in a series; the other available tape is "An Introduction to Writing Your Will." These videotapes are designed for use in legal assistance office waiting rooms, unit preventive law classes, and predeployment briefings. Legal assistance offices can obtain a copy of the power of attorney videotape by sending a blank ¾-inch videotape cartridge to The Judge Advocate General's School, U.S. Army, Administrative & Civil Law Division, ATTN: ADA-LA, Charlottesville, VA 22901, and identifying the title of the tape requested.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Reserve ID Cards

The Judge Advocate General's School does not issue Reserve Component ID cards. A Reserve officer who needs an ID card should follow the procedure outlined below:

1. Fill out DA Form 428 and forward it to Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-PSE-VC, 9700 Page Boulevard, St. Louis Missouri 63132. Include a copy of recent AT orders or other documentation indicating that applicant is an actively participating Reservist.

2. RCPAC will verify the information and the individual's entitlement, prepare an ID card, and send it back to the Reservist.

3. The Reservist must sign it, affix fingerprints, attach an appropriate photograph, and return the materials to RCPAC.

4. RCPAC will affix the authorizing signature and laminate the card, and will send the finished card to the applicant. Also inclosed will be a form receipting for the ID card.

5. Applicant must execute the receipt form and send it to RCPAC.

2. **JAGSO Triennial Training.** The Judge Advocate General's Service Organizations Triennial Training will be conducted at The Judge Advocate General's School from 20 June to 1 July 1983 for Court-Martial Trial and Defense Teams. Inprocessing of team members will take place on Sunday, 19 June 1983. Attendance will be restricted to officers assigned to Court-Martial Trial or Defense Teams. Alternate AT should be scheduled for warrant officers and enlisted members. The 1155th United States Army Reserve School, Edison, New Jersey will host the training. Orders should reflect assignment to the 1155th USARS with duty station at TJAGSA.

3. **JAOAC Phase II.** The Judge Advocate Officer Advanced Course (Phase II) will also be conducted from 19 June—2 July 1983. Transfers will not be allowed from one course to the other after arrival at Charlottesville. Quotas for ARNG will be available through channels from the Education Branch, National Guard Bureau. Quotas for USAR will be available through channels from the JAGC Personnel Management Officer, RCPAC. Requests for quotas should be received no later than 1 April 1983. The 1155th United States Army Reserve School, Edison, New Jersey will host the training. Orders should reflect assignment to the 1155th USARS with duty station at TJAGSA.

Honorary Academic Chair Established at TJAGSA

A new honorary academic chair of International Law has recently been established at The Judge Advocate General's School. Named for Waldemar A. Solf, the academic chair recognizes the many contributions of Mr. Solf to the military practice of law. A soldier, scholar and statesman, Mr. Solf's service to the United States has spanned more than forty years, both in and out of uniform. Among his many accomplishments, Mr. Solf has served at The Judge Advocate General's School and as Chief of both the Criminal Law and the International Affairs Divisions in the Office of The Judge Advocate General. Prior to his retirement, Mr. Solf served as a United States delegate to many multilateral treaty negotiations.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

The annual Chief Legal Clerk's Conference, hosted by Headquarters, Health Services Command, Fort Sam Houston, was held 27-30 June 1982 in San Antonio, Texas. BG Lefler, Deputy Commanding General, Health Services Command, welcomed the attendees and highlighted the impact of the law in the medical arena, emphasizing procurement, medical malpractice, and legal assistance to patients. MG Clausen, The Judge Advocate General, formally opened the conference and announced the pending reassignment of SFC(P) John Meehan, OTJAG Liaison to MILPERCEN, to Alaska and named SFC Tae K. Sture of HQ, Health Services Command, as his replacement. Retired Sergeant Major of the Army Van Autreve addressed the conference, focusing on the responsibility of the chief legal clerk to advise other NCOs in the chain of command, i.e., first sergeants and command sergeants major, on the legal aspects of discipline and morale. He also emphasized the soldier's duty to vote and to encourage others to vote.

SGM Peterson from Eighth Army, Korea, and SFC Richardson from USAREUR informed the conferees about overseas assignment procedures and problems. Other highlights of the conference included the remarks of MG Clausen, and the announcement of TJAG Sergeant Major's award for outstanding achievement. New procedures for applying for warrant officer status, and developments in SQT were discussed. Also, the attendees were addressed by SMA Connelly, and former TJAG, Dean Alton Harvey, MG (USA Retired).

The conference attendees were divided into six committees: (1) Steering; (2) Court-Reporter; (3) General Administration; (4) Training and Education; (5) Awards and Conference; and (6) Reserve Affairs/National Guard. This committee structure proved to be a popular and workable format. Many ideas were discussed and recommendations formulated. Position papers will be prepared by the respective committee chairpersons and forwarded to the TJAG Sergeant Major in September. The development and progress of these issues will be reported in future *The Army Lawyer* articles.

Unfortunately, we were not able to have 100% participation by active duty chief legal clerks and only two Reservists attended. Many absentees attributed this to a lack of available funding. I urge all of you to coordinate with your respective SJAs to obtain funding for next year's workshop which will be held at TJAGSA in Charlottesville.

CLE News

1. Attention Nevada Bar Members

Commencing 1 January 1982, each active member of the state bar of Nevada must complete ten hours of annual continuing legal education from an accredited educational activity. The Judge Advocate General's School has been so accredited by the Nevada bar. In order to receive credit for courses taken at TJAGSA, Nevada attorneys must notify the Deputy Director, Academic Department at the commencement of the TJAGSA CLE course for which credit is desired. Those attorneys who have taken courses at TJAGSA since 1 January 1982 and desire credit in Nevada should notify the Deputy Director, Academic Department, TJAGSA, Charlottesville, Virginia 22901, of the courses attended and the dates on which they were taken. This information will then be verified and forwarded to the Nevada state bar.

2. Eligibility and Quota Requirements for CLE Courses at TJAGSA

Over the last several months a number of officers attending the continuing legal education courses offered by The Judge Advocate General's School did not meet the eligibility requirements for the courses. These courses are designed to

orient and prepare judge advocates for duty in certain subject matter areas. Further, each officer attending must receive a quota for the particular course offered prior to arrival. An officer's arrival without an allocated quota disrupts the administrative, logistical, and instructional flow of the course. This is especially true in courses requiring substantial individual participation.

Staff judge advocates are reminded that officers selected to attend these courses must meet the course prerequisites listed in the School's Annual Bulletin. Once an eligible officer is selected, they must insure that a quota from the servicing training office is received before sending that officer to a course. Any requests for an exception to the prerequisites must be approved beforehand by the Academic Department Division offering the course.

Following this procedure insures that the right officers receive the training for which the courses are designed.

3. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

4. 5th Claims Course at TJAGSA

The 5th Claims Course will be conducted at The Judge Advocate General's School during the period of 18-21 October 1982. This course is open to Army active duty and Reserve Component attorneys and to civilian attorneys employed by the Department of the Army. The course purpose is to provide continuing legal education in the operation of the Army Claims System. The course is designed to meet the needs of the claims attorney who has been assigned as a claims officer for one year or less.

5. TJAGSA CLE Course Schedule

October 5-8: 1982 Worldwide JAG Conference.

October 13-15: 4th Legal Aspects of Terrorism (5F-F43).

October 18-December 17: 99th Basic Course (5-27-C20).

October 18-21: 5th Claims (5F-F26).

October 25-29: 7th Criminal Trial Advocacy (5F-F32).

November 1-5: 21st Law of War Workshop (5F-F42).

November 2-5: 15th Fiscal Law (5F-F12).

November 15-19: 22d Federal Labor Relations (5F-F22).

November 29-December 3: 11th Legal Assistance (5F-F23).

December 6-17: 94th Contract Attorneys (5F-F10).

January 6-8: Army National Guard Mobilization Planning Workshop.

January 10-14: 1983 Contract Law Symposium (5F-F11).

January 10-14: 4th Administrative Law for Military Installations (Phase I) (5F-F24).

January 17-21: 4th Administrative Law for Military Installations (Phase II) (5F-F24).

January 17-21: 69th Senior Officer Legal Orientation (5F-F1).

January 24-28: 23d Federal Labor Relations (5F-F22).

January 24-April 1: 100th Basic Course (5-27-C20).

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16-20: 11th Methods of Instruction.

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 97th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 15-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

6. Civilian Sponsored CLE Courses

December

1: VACLE, Estate Planning and Administration, Roanoke, VA.

2. VACLE, Estate Planning and Administration, McLean, VA.

5-10: NCDA, Prosecutor's Investigators School, Huntsville, TX.

5-10: NJC, Search and Seizure—Specialty, Reno, NV.

5-10: NJC, Adm. Law: Procedure—General (2nd week), Reno, NV.

5-17: NJC, Decision Making: Process, Skills and Techniques—Graduate, Reno, NV.

9: VACLE, Estate Planning and Administration, Richmond, VA.

10: VACLE, Estate Planning and Administration, Norfolk, VA.

12-17: NJC, Evidence—Graduate, Reno, NV.

12-17: NJC, Court Administration—Speciality, Reno, NV.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OCLI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Pamphlets.

Number	*Title*	*Change Date*
DA Pam 360-539C	Survivor Benefit Plan for the Uniformed Services (Supersedes DA Pam 360-539B dated 1979)	1982
DA Pam 550-81	Area Handbook Series—North Korea; A Country Study	Third ed. 1981

2. Articles.

Di Leo & Model, *A Survey of the Law of Property Distribution Upon Divorce in the Tristate Area* [New York, New Jersey, Connecticut], 56 St. John's L. Rev. 219 (1982).

Kunkel, *Third Annual Survey of Sixth Circuit Law: Evidence*, 2 Det. C.L. Rev. 419 (1982).

Note, United States v. Salvucci: *Privacy, Property, & Narrower Grounds for Standing on the Fourth Amendment*, 35 Ark. L. Rev. 342 (1981).

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may get this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative yearly indices are provided users. TJAGSA publications may be identified for ordering purposes through these. Also, recently published titles and the identification numbers necessary to order them will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the let-

ters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B063185	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-81-1
AD B063186	Criminal Law, Procedure, Trial/JAGS-ADC-81-2
AD B063187	Criminal Law, Procedure, Posttrial/JAGS-ADC-81-3
AD B063188	Criminal Law, Crimes & Defenses/JAGS-ADC-81-4
AD B063189	Criminal Law, Evidence/ JAGS-ADC-81-5
AD B063190	Criminal Law, Constitutional Evidence/JAGS-ADC-81-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

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